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The recent case of Morris v. Dodd, by the Supreme Court of Georgia, involves an interesting question of bankruptcy. It was held that a policy of insurance on the life of a bankrupt though payable to his legal representatives, does not, if it have no cash surrender value, vest in the trustee in bankruptcy as assets of the bankrupt's estate. Accordingly, where a husband, within four months prior to the filing of his petition in bankruptcy, transferred to his wife an insurance policy on his life, which before such transfer was payable to his legal representatives, it was held that it was error in the court below, on the petition of the trustee filed upon the death of the bankrupt pending the proceedings in bankruptcy, to enjoin the widow from collecting and the insurance company from paying to her the amount due upon the policy, it appearing that it had no cash surrender value, either when the transfer was made or the petition in bankruptcy was filed.

A law passed at the last session of the New York legislature and which goes into effect on the first of next month is worthy of attention. This law provides that hereafter no person or persons shall carry on or transact business in the State under any assumed name or under any designation, name or style, corporate or otherwise, other than the real name of the individual or individuals carrying on such business unless after filing in the office of the clerk of the county where such business is carried on, a certificate setting forth the name under which the business is to be transacted and the true full name or names of the person or persons conducting the business, with his or their post-office address. Persons now carrying on business under an assumed name, or under any designation other than the real name, are required to file a certificate such as is above described within thirty days after the act takes effect, and any person failing to file such certificate is declared guilty of a misdemeanor. The object of the law is to prevent the use of assumed names or of corporate names where there is no real incorporation.

An important decision affecting the exemptions of homesteads in cities has recently been rendered by the Supreme Court of Florida. According to this decision the exemption of a homestead in an incorporated city or town does not extend under the State constitution to any other improvements or buildings than are comprehended under the terms "residence and business house of the owner," and, where the buildings or improvements in excess are not physically connected with the residence or business house, such improvements or buildings and the land upon which they are situated may be sold under execution for the owner's debts. This is true even though such improvements are inseparably attached to or form parts of an undivisible building which likewise constitutes the residence and business house of the owner.

The ground of the decision is clearly indicated in the opinion of the chief justice of the court, who says that in those cases where a non-exempt improvement or building is combined in a single structure that likewise constitutes the residence or business house of the owner, the soil perpendicularly under and covered by any such non-exempt improvement is improperly dedicated to other uses than are consistent with the constitutional right of exemption, and is, therefore, not exempt, and this whether such non-exempt improvement be situated upon the first, second, third, fourth or tenth floor of a many-storied building, and notwithstanding the fact that the space perpendicularly above or below such non-exempt improvement may be properly utilized by the owner for legitimate residence or business purposes. The court said that it might be that in the application of the rule the whole of the residence or business house exemption might be taken away and defeated, but it declared that in such case the blame must fall upon the exemptor, who thus devotes the same soil to two inconsistent uses, the one legally sufficient to support the exemption contended for, and the other legally sufficient to defeat or destroy it. This is an illustration sufficiently familiar in judicial records of where the courts step in to check evasions of the law by applying the rule of equity and common sense.

NOTES OF IMPORTANT DECISIONS.

WILL—LEGACY—CHARGE ON LAND.—In Clotilde v. Lutz, 57 S. W. Rep. 1018, decided by the Supreme Court of Missouri, it was held that a testator, who had no personal property at the time he executed his will and bequeathed certain specific legacies, will be presumed to have intended to charge them on his lands. The court said in part:

"The question presented by this appeal is whether, under the facts stated, the various legacies bequeathed in the will must fail because there is no personalty out of which they can be paid, or, in the absence of express provision in the will for their payment out of the real estate of which the testatrix died seized, are they a charge on such real estate? The rule announced by this court for the construction of a will is to give full force and effect to every word and sentence in it, if possible to do so, and then construe it as a whole, so as to meet the intention of the testator, and, in order to arrive at such intention, there is no better way than to put one's self, as near as may be, in the position of the testator at the time of its execution. The will provides that all of the bequests shall be paid, if practicable, within six months after the death of the testatrix, and after the payment of all her debts, funeral expenses and bequests, she gave all the rest and residue of her personal property, whatever the same might consist of, to her husband, George A. Lutz. At the same time she must have known that she did not have any personal property with which to pay said legacies, or even her funeral expenses, much less a residue to give to her husband. Upon these facts is predicated the argument that they make these legacies an equitable and implied charge upon the real property of the estate. General legacies are more favored in law than specific legacies, and it has been the disposition of all courts to maintain all general legacies which the testator clearly intended should be paid, regardless of the sufficiency of the fund; and it has been said: 'If the language of the will indicates that the testator intended legacies to be paid, knowing that his personal estate would be insufficient for that purpose, or if it appear that, in giving the legacies, he had the real estate in mind, there will be a charge thereon, although it be devised.' 2 Am. Law Admn. (2d ed.), pp. 1096, 1097, sec. 491. In Downman v. Rust, 6 Rand. 587, a single woman, having but little personal property, and real estate of considerable value, having only one brother, who would have been her heir and distributee, by her will bequeathed certain legacies to two of her friends as tokens of affection, and made the brother executor and residuary legatee. It was held that she must be considered as intending that the legacies should be paid out of the land. In Hoyt v. Hoyt, 85 N. Y. 142, it is said: 'It is assumed that no man, in making a final disposition of his estate, will make a legacy, save with the honest, sober-minded intention that it shall be paid. Hence, when, from the provisions of a will prior to the gift of legacies, it is seen that the testator must have known that he had already so far disposed of his personal estate as that there would not be enough left to pay the legacies, it is reasoned that the bare fact of giving a legacy indicates an intention that it shall be met from real estate.' In McCorn v. McCorn, 100 N. Y. 511, 3 N. E. Rep. 480, the testator executed a will previous to the day of his death, by which he bequeathed to his wife $1,000, and to his son M $400, and gave the residue of his estate to four children, to be divided equally between them. The personal estate left by the testator was insufficient to pay his funeral expenses. In an action to have the widow's legacy declared to be a charge upon the real estate, it was held that the intent of the testator was that both legacies should be so chargeable; the court saying: 'Whether a legacy is charged upon the real estate of the decedent is always a question of the testator's intention. The language of the will is the basis of the inquiry, but extrinsic circumstances which aid in the interpretation of that language, and help to disclose the actual intention, may also be considered. * * * His personal estate was insufficient even to pay his funeral expenses, and the two legacies to the widow and son were mere mockeries, unless meant to be a charge on the real estate. The testator must have known that he had no personal estate with which to pay the smallest portion of his bequests; and, unless he meant to charge them upon the land, we must impute to him the deliberate and conscious intention of making bequests to his wife and son which he knew could never be paid. * * * But the situation is such that all possibility of innocent mistake is removed, and the facts drive us to the alternative of believing that the testator, in making his last will, under the solemnity of approaching death, indulged in bequests known to be useless and vain, or meant that they should be paid from the only possible source. No reasonable intelligence can hesitate to draw the latter inference.' So, in Duncan v. Wallace, 114 Ind. 169, 16 N. E. Rep. 137, it is said: 'Where a testator gives legacies and so disposes of all his personal property that it cannot be made available for the payment of the legacies, the natural presumption is that he intended to charge the land with the payment of the legacies, since a different rule would attribute to him a purpose to make a gift in appearance, and not reality. * * * So, where a testator has no personal property at the time he executes a will and bequeaths specific legacies, the reasonable presumption is that he intended to charge them on the land, for it is not to be presumed that he did no more than make an empty show of giving a bounty to the legatees. But this presumption does not prevail where there is personal estate at the time the will was executed, although it may subsequently be lost to the testator.'

"That the testatrix was possessed of no per-

sonal property at the time of the execution of the will was clearly shown by the facts and circumstances, and especially by the testimony of Mrs. Catharine Bauer, a witness for defendant, who testified, in so many words, that the testatrix 'stated to her that she did not have any money to pay the legacies, and that they were to be paid by selling one of the houses;' and, while the language of the will is the basis of the inquiry as to the intention of the testatrix, and parol evidence inadmissible to add to or subtract from it, this evidence was admissible for the purpose of showing that she had no personal property with which to pay the legacies (McCorn v. McCorn, *supra;* Duncan v. Wallace, *supra*), and tends strongly to show that her intention was to charge them on the real property."

THE ACCEPTANCE OF BENEFITS FROM RAILROAD EMPLOYEES' RELIEF ASSOCIATIONS AS A DEFENSE TO ACTIONABLE NEGLIGENCE RESULTING IN PERSONAL INJURIES OR DEATH.

Introductory.—In the pioneer case, wherein the "relief defense" was first interposed,[1] it was clearly proved that the negligence producing the accident wherein plaintiff was injured was that of his fellow-servant, and the trial court therefore properly directed a verdict for the defendant. The *per curiam* opinion makes no references to the release nor was its consideration necessary to a decision of the case. The case is only found in unofficial publications. The relief association, membership in, and acceptance of benefits from which was relied on, in part, as a defense in that case, was known as the Baltimore & Ohio Employees' Relief Association. It was formed for the benefit of a railroad company and its employees.[2] Employment by the railroad company was conditioned on membership in the relief association; in other words, membership therein was compulsory on employees of the railroad company.[3] The railroad company guaranteed all obligations of the relief association and loaned it $100,000 to make the guarantee good.[4] The president of the railroad company was *ex officio* president of the association, and a committee appointed by and from the board of directors of the railroad company formed a board of managers of the association, had custody and control of its funds, and deposited them in bank along with, and undistinguished from, the moneys of the railroad company.[5] The members of the relief association, *i. e.*, the employees of the railroad company whose assessments, dues, etc., formed the relief fund, were represented in the management thereof by an advisory committee.[6] The railroad company collected the premiums due the association by deducting the amounts assessed from time to time, from the monthly wages of its employees,[7] gave it other aid in the furnishing of medical attendance to the injured, clerical force, office, etc.[8] The expressed objects of the association, among others, was to extend relief in case of sickness, injury, old age and death to the employees of the railroad company and their families, to receive deposits on interest from said employees and their wives, and loan them money at lawful rates of interest in order to provide them with or to improve homesteads, and generally to promote their welfare.[9] The relief fund formed by accumulating the contributions made by and the assessments, premiums and dues collected off of the men, rose in a few years to over a half a million dollars in the aggregate, while the liability of the railroad company to be called upon to make good its guaranty grew correspondingly remote.[10] The benefits that the railroad company expected to derive, and which were in fact obtained, by its promotion and maintenance of the association, was im-

[1] Graft v. B. & O. R. Co., 6 Cent. Rep. 633, 8 Atl. Rep. 206.

[2] Fuller v. Baltimore & O. E. R. A., 67 Md. 433, 10 Atl. Rep. 237, Baltimore & O. R. Co. v. Cannon, (Md.) 20 Atl. Rep. 123.

[3] *Id* ; Fuller v. B. & O. Emp. Rel. Assn., 67 Md. 443, 10 Atl. Rep. 237; Martin v. B. & O. R. Co., 41 Fed. Rep. 125, 126; State v. B. & O. R. Co., 36 Fed. Rep. 655.

[4] Owens v. Baltimore & O. R. Co., 35 Fed. Rep. 715, 1 L. R. A. 75; Graft v. B. & O. R. Co. (Penn.), 8 Atl. Rep. 206.

[5] *Ibid.*; Baltimore & O. R. Co. v. Flaherty (Md.), 39 Atl. Rep. 1076; *Cf.* Fifth Annual Report of the Commr. of Labor.

[6] Fifth Annual Report, Commr. of Labor, 23.

[7] B. & O. Rel. Assn. v. Post, 2 L. R. A. 44, 46; Spitze v. B. & O. R. Co., 75 Md. 162, 23 Atl. Rep. 307; Martin v. B. & O. R. Co., 41 Fed. Rep. 125, 126.

[8] Fuller v. Baltimore & Ohio Employees' Relief Association, 67 Md. 433, 10 Atl. Rep. 237.

[9] Graft v. Baltimore & Ohio Relief Assn. R. Co. (Penn.), 8 Atl. Rep. 206, 208, 6 Cent. Rep. 633.

[10] Owens v. B. & O. R. Co., 35 Fed. Rep. 715, 1 L. R. A. 75; Baltimore & O. R. Co. v. Flaherty (Md.), 39 Atl. Rep. 1076.

munity from suits brought by employees who were, or who supposed they were, injured by its negligence. The benefits that its employees, members of the association, expected to derive from it, was the payment of a daily allowance or certain fixed sums, as benefits or relief, in cases of sickness, accidents and injuries, even under circumstances involving no actionable negligence whatever on the part of the company.[11] The concern was in fact a specially chartered corporation closely resembling in many features those authorized to be organized under the general laws of my State, for the purpose of "furnishing life indemnity or pecuniary benefits to the beneficiaries of deceased members, or accident or permanent disability indemnity to members thereof, on the assessment plan;" in other words, a species of insurance company, but combining therewith the franchise of a savings bank, and a building and loan association, the whole under the absolute control of the railroad company. It is sometimes called a benevolent society, although its contracts are construed on the strictest principles of insurance law,[12] and has been referred to as a life insurance company,[13] but its peculiar feature was that, whereby on the strength of a guaranty, which, owing to the accumulations of the assessment levied on its men, involved no hazard of loss, the railroad company was entitled under its by-laws to set up the acceptance of benefits by the injured employee as a defense to its torts,[14] and which denied the right of recovery to the beneficial plaintiffs in actions for death by wrongful act when it was shown that the beneficiary in the membership certificate had collected the death benefit.[15] After a duration of six years, the Maryland legislature repealed the charter of the relief association,[16] whereupon the committee of managers transferred all the assets, credits and securities of the association to the railroad company, to hold in trust for a new association (unincorporated), or relief department, in which membership was offered to the certificate holders of the retiring association, 95 per cent. of whom transferred their membership thereto, while the remainder entered upon litigation with the chartered association and the railroad company for the enforcement of an equitable adjustment of their shares or interests,[17] in which they were soon afterwards joined by members of the new relief department, in which litigation there was alleged and proved, what Mr. Justice Ryan, of the Maryland Court of Appeals, judicially characterizes as "a breach of trust of a very serious character on the part of the railroad company" in converting the relief funds outright to corporate purposes,[18] thus emphasizing the danger of merging the functions of an insurance company with those of a railroad. The foregoing historical sketch of the chartered association, necessarily imperfect, because wholly constructed from a review of the reported cases wherein its operations came before the courts, discloses so exactly the plans and objects of the more recent "relief departments," or "voluntary relief associations," as to render it unnecessary to expand my text with a transcription thereof when I reach their consideration. Divested of the old age relief, or pension feature, and the savings bank, loan and homestead feature, the Baltimore & Ohio Employees' Relief Association had the same objects as the Burlington Voluntary Relief Department, the Chicago, Burlington & Quincy Relief Department, the Philadelphia & Reading Railroad Relief Association, the Pennsylvania Railroad Volunteer Relief Department, the Voluntary Relief Department of the Pennsylvania lines west of Pittsburgh, the Plant System Relief and

[11] Fuller v. Baltimore & O. Rel. Assn., 67 Md. 433, 10 Atl. Rep. 237; Martin v. B. & O. R. Co., 41 Fed. Rep. 125; Spitze v. Baltimore & O. R. Co., 75 Md. 162, 23 Atl. Rep. 307.

[12] Baltimore & O. Rel. Assn. v. Post (Md.), 10 Atl. Rep. 237; Baltimore & Ohio Rel. Assn. v. Kinney (W. Va.), 15 L. R. A. 142.

[13] B. & O. R. Co. v. Cannon, 72 Md. 493, 20 Atl. Rep. 123; Same v. Brown (Md.), 20 Atl. Rep. 524; Fuller v. B. & O. Emp. Rel. Assn., 10 Atl. Rep. 237, 239. And the contracts of the voluntary relief associations are also construed on principles of accident insurance law. Relief Department v. Spencer (Ind.), 46 N. E. Rep. 477.

[14] Graft v. B. & O. R. Co. (Penn.), 8 Atl. Rep. 206; Spitze v. B. & O. R. Co. (Md.), 23 Atl. Rep. 307. Owens v. B. & O. R. Co., 35 Fed. Rep. 715, 1 L. R. A. 75, is no exception to the text.

[15] State v. B. & O. R. Co., 36 Fed. Rep. 655.

[16] Baltimore & O. R. Co. v. Cannon, 72 Md. 493 20 Atl. Rep. 123.

[17] *Id.* B. & O. R. Co. v. B. & O. Emp. Rel. Assn., 77 Md. 566, 26 Atl. Rep. 1045; B. & O. R. Co. v. Brown, 79 Md. 442, 29 Atl. Rep. 524.

[18] Baltimore & O. R. Co. v. Flaherty, 39 Atl. Rep. 1076, 1080.

Hospital Department, and perhaps the relief associations of other railroad systems,[19] which have not yet come under the notice of the courts. They are virtually managed by the railroad corporation or system under whose auspices they are formed, their funds are collected the same way that they were collected by the chartered association, and the benefits and advantages expected by the railroad companies and their employees do not differ from those derived by the railroad company that promoted the chartered concern, and expected, during its continuance, by the employees who contributed their money to form its relief fund. While the existence of these associations has never been attacked by direct proceedings, their contracts have been bitterly contested in suits for personal injuries, or on death liability statutes, as contrary to public policy, as conflicting with the rule of law forbidding the employer to contract himself out of liability for his prospective negligence; conflicting with employer's liability legislation, or constitutional provisions designed to safeguard that rule from judicial impairment; *ultra vires* the corporate powers; lacking mutuality or privity to support the same as a release in favor of the railroad company and wanting consideration. These objections and the disposition thereof by the State and federal courts, I shall endeavor to succinctly set forth herein, following the same with some observations on the questions of pleading and practice growing out of the interposition of "relief defenses."

Not Contrary to Public Policy.—In sustaining this defense against the objection that the contract was contrary to public policy as a stipulation whereby the employer secured immunity from damages sustained by his employees injured or killed through his negligence, the courts profess to distinguish between a release in express terms of prospective damages, and an arrangement whereby the injured employee, or his beneficiaries under death liability statutes, were given an election to accept benefits from the relief fund, or assert their right to statutory damages by an action at law. In Owens v. Baltimore & O. R. Co.,[20] the court said that this is quite as legitimate as it is to settle claims of this character out of court by private negotiations, which is done constantly, and if fairly done, nobody thinks of questioning it. The compulsory feature of the contract was not noticed in this case, but the Court of Appeals of Maryland had previously refused to hold the contract invalid as against public policy on that ground saying, that while a compulsory insurance at first view appeared harsh, an insurance to some extent, by general consent was deemed advisable, especially to those who have others dependent upon their daily labor.[21] "The provision exacting the release is one not unreasonable for the company to make, interested as it is as a guarantor. * * The employees have the right to decline the service of the company under such conditions, but if they accept it, knowing the conditions, they are bound by them." And this language was subsequently quoted with approval in the second instance in which such a contract came before a federal court.[22] The Supreme Court of Pennsylvania,[23] noticing the fact that the benefits payable by the relief department of the defendant corporation were available for the relief of members disabled by accident in the service or by sickness or injury other than in the company's service, without reference to the question of negligence of the master, thus including benefits in cases of accidents, pure and simple, of injury by the negligence of fellow-servants, and even by the member's own contributory negligence, covering a wide field in which there is no legal liability on the part of the railroad company, pronounced the association of the highest order of beneficial societies. The court further said: "But even in cases of injury through the company's (actionable) negligence there is no waiver of any right of action that the injured person may thereafter be entitled to. It is * * * the acceptance of benefits after the accident that constitutes the release. * * * The injured party is not agreeing to exempt the company from liability for negligence but accepting compensation for an injury already caused thereby. He may as well accept it in install-

[19] Fifth Ann. Rep. Commr. of Labor, Washington, 1890, page 23.

[20] 1 L. R. A. 75, 35 Fed. Rep. 715.

[21] Fuller v. B. & O. Emp. Rel. Assn., 67 Md. 433, 10 Atl. Rep. 237.

[22] State v. R. R. Co., 36 Fed. Rep. 655. To the same effect: Johnson v. Charleston & S. R. Co., 44 L. R. A. 653, 32 S. E. Rep. 2.

[23] Johnson v. Philadelphia & R. R. Co., 163 Pa. St. 127, 29 Atl. Rep. 851.

ments as in a single sum, and from an appointed fund to which the company has contributed, as from the company's treasury as a result of litigation. The substantial feature of the contract which distinguishes it from those held void as against public policy is that the party retains whatever right of action he may have until after knowledge of all the facts and an opportunity to make his choice between the sure benefits of the association or the chances of litigation. There is therefore no public policy which the contract can be said to transgress." And the foregoing views of the United States Circuit Court, Southern District of Ohio, the same, for the District of Maryland, the Court of Appeals of Maryland, and the Supreme Court of Pennsylvania, have been concurred in Nebraska,[24] Indiana,[25] Iowa,[26] Ohio,[27] Illinois[28] and New Jersey.[29]

By an evenly divided bench the Supreme Court of South Carolina refused to reverse judgment of the trial court on verdict directed in favor of the defendant, where it appeared that the plaintiff had accepted benefits from the Plant System Relief & Hospital Department under this kind of a contract,[30] and the question is therefore still open in that State. There is practically an unanimity of views between the federal courts of the various circuits wherein the question has been presented, a verdict for defendant having been directed in the District of West Virginia upon the interposition of this defense,[31] in the Northern District of Illinois under like circumstances,[32] while in the Northern District of Indiana, and in the Northern District of Ohio, Ricks, and Baker, respectively sitting as circuit judges, overruled demurrers to defendant's answer specially setting up a "relief defense."[33] The position taken by the Circuit Court of Appeals, Eighth Circuit,[34] does not conflict with the foregoing authorities, which are in fact cited with approval, although "relief defense" therein interposed failed for want of having been duly pleaded. Such a contract, however, was held by Hallett, sitting as circuit judge, District of Colorado, to be so unreasonable as to justify the court in refusing to enforce it. Meeting the argument that defendant had an election between two methods of compensation, he said:[35] "The logic of the proposition should be differently stated. Having paid for benefits, upon what principle can he be required to renounce them? * * * In respect to this contract defendant is an insurance company, and having received the premium demanded of plaintiff, the latter is fully entitled to the benefits which he received, independently of any question affecting his relations to the railroad company as an employee." But as we have just seen, the defense in this case was not sufficiently presented by the pleadings to warrant a consideration by the learned judge of the so-called "relief defense," which was inferentially sustained by the Circuit Court of Appeals, with certain qualifications respecting the necessity for amplitude of statement thereof in defendant's answer, and this is the extent of the ruling of the Supreme Court of Colorado.[36]

Do Not Conflict with Employer's Liability Legislation.—The extension of the employer's liability to certain classes of injuries due to the negligence of fellow-servants, and the repeal, in whole or in part, of the doctrine of assumed risk, has been accomplished in some States by express constitutional enactment, in others by legislation modeled on, and con-

[24] C., B. & Q. R. Co. v. Wymore, 40 Neb. 645, 58 N. W. Rep. 1120; Bell v. C., B. & Q. R. Co., 44 Neb. 44, 62 N. W. Rep. 314, 11 Am. & Eng. Ry. & Corp. Rep. 682. But the court refused to assent to the proposition that the railroad company was entitled to make membership in the relief association compulsory on its employees. The court said it was unable to discover anything in the contract that was unconscionable, contrary to law, or subversive of morals or good government. Bell's case.

[25] Leas v. Penn. Co., 10 Ind. App. 47, 37 N. E. Rep. 423.

[26] Donald v. C., B. & Q. R. Co., 93 Iowa, 184, 61 N. W. Rep. 971, 33 L. R. A. 492; Maine v. R. R. Co., 70 N. W. Rep. 630.

[27] Pittsburg, C., C. & St. L. R. Co. v. Cox, 55 Ohio St. 497, 45 N. E. Rep. 641, 35 L. R. A. 507, 7 Am. & Eng. Ry. Cas. (N. S.) 652, 7 Ohio L. J. 30, citing Baltimore & O. R. Co. v. Bryant, 9 Ohio C. C. 332.

[28] Eckman v. R. R. Co., 169 Ill. Sup. 312, 48 N. E. Rep. 496, 38 L. R. A. 750, 9th Am. & Eng. R. R. Rep. (N. S.) 308, affirming 64 Ill. App. 444.

[29] Beck v. Penn. R. R. Co. (N. J.), 43 Atl. Rep. 908, Vroom, cited in Black's Law & Prac. in Acc. Cases, § 302, note 37, page 403.

[30] Johnson v. Charleston & S. Ry. Co., 55 S. Car. 152, 44 L. R. A. 645, 32 S. E. Rep. 2.

[31] Martin v. B. & O. R. Co., 41 Fed. Rep. 125.

[32] Vickers v. C., B. & Q. R. Co., 71 Fed. Rep. 139.

[33] Otis v. Penn. Co., 71 Fed. Rep. 136; Shaver v. Penn. Co., 71 Fed. Rep. 931.

[34] C., B. & Q. v. Miller, 40 U. S. App. 448, 76 Fed. Rep. 439, 22 C. C. A. 264.

[35] Miller v. C., B. & Q. R. Co., 65 Fed. Rep. 305.

[36] C., B. & Q. R. Co. v. McGraw, 45 Fed. Rep. 383.

forming more or less to, the English Act of Parliament of 1880.[37] The provisions of the constitution of South Carolina are representative of the first mentioned method, the Indiana Employer's Liability Act of 1893, of the second. As it has been held in England that the employee had a right to contract away the benefits of the law,[38] American legislatures and constitutional conventions have proceeded on the theory that the courts would adopt the construction which that act received in the country of its origin, and have consequently incorporated therewith various provisions leveled at contractual exoneration of the master from the consequences of his own and his employees delicts. Thus, in South Carolina, after putting the employee on the same footing as other persons not employees, so far as his rights and remedies for injuries sustained under the circumstances mentioned in the constitution are concerned, declaring that notice and knowledge on his part of the defective and unsafe condition of the machinery, etc., causing the injury should be no defense to the action for the resulting injuries, extending the provisions of the simple death liability act to the personal representatives of employees killed under circumstances that would have given them a right of action had they lived; and declaring that the adoption of these provisions should not deprive the employee of any common law right, the constitution then proceeds,[39] "any contract or agreement, expressed or implied, made by any employee to waive the benefit of this section shall be null and void." It seems to have been inferentially held by a circuit court of that State that the relief contract and release set up as an affirmative defense in the case just cited was not in conflict with this constitutional provision, but on an evenly divided bench the judgment below was affirmed, and it was subsequently held on application for rehearing that the consideration of the constitutional question was not necessary to a decision of the case. This is the only case that has so far arisen in which this form of contract was claimed to be contrary to constitutional provisions of the character of that of South Carolina, but while it decides nothing, the able and exhaustive opinion of McIver, C. J., convinces the writer that in that jurisdiction at any rate future decisions will be adverse to the contention of non-constitutionality. By section 5 of the Indiana Employer's Liability Act it is provided that all contracts made by a railroad or other corporation, with their employees, or rules or regulations adopted, releasing or relieving from liability to any employee having a right of action under the provisions of this act are hereby declared null and void.[40] It was held in Montgomery v. Penn. Co.,[41] that it was by force of the antecedent contract that the acceptance of benefits worked the release of the employer, that as the contract was therefore repugnant to the statute in attempting to exonerate the employer against the consequences of a prospective violation of the act, it could not be aided by the subsequent act of the employee, and his perception of benefits from the relief fund was consequently no defense against the master's tort. But this ruling of the court has been expressly repudiated in a subsequent decision in a case involving a relief association membership contract of identical terms.[42]

The court there held that the contract expressly recognizes the enforceable liability of the master in favor of the injured employee, and only stipulates that if he prosecutes suit against the company to final judgment he shall thereby forfeit his right to benefits from the relief fund, and if he accepts compensation from the relief fund he shall thereby forfeit his right of action against the company. * * * It is the final choice between two sources of compensation where but a single one existed, the acceptance of one as against the other that gives validity to the transaction, and not the antecedent membership contract. A similar conclusion has been reached in Iowa in construing the con-

[37] 43 & 44 Vict. ch. 42.

[38] Griffiths v. Earl Dudley, L. R. 9 Q. B. D. 357.

[39] Constitution, 1895, Art. 9, § 15; Johnson v. Railroad Co., 55 S. Car. 152, 44 L. R. A. 646, 32 S. E. Rep. 2, 12 Am. & Eng. R. Cas. (N. S.), 761, 4 Chic. L. J. Wkly. 81.

[40] II Bailey's Per. Inj. Rel. to M. & S. § 1975, p. 632; Acts 1893, ch. 130, p. 294.

[41] 152 Ind. 1, 49 N. E. Rep. 582, 9 Am. & Eng. R. Cas. (N. S.) 792, 44 L. R. A. 638.

[42] Pittsburgh, C., C. & St. L. R. Co. v. Moore, 44 L. R. A. 639. Hosea v. R. R. Co., 152 Ind. 412, 53 N. E. Rep. 419. This case is interesting because of the refusal of the Indiana Supreme Court to deny the right of action under the Employer's Liability Act of that State, where the injury appeared to have been inflicted and the death occurred in Kentucky, thus giving extraterritorial effect to Indiana law.

tract with reference to the Code of that State,[43] and in Ohio under the Act of April 2, 1890;[44] the provisions of which last-mentioned act were held by Judge Ricks, in the United States Circuit Court, Northern District of Ohio,[45] on the strength of a "well considered" opinion of the Ohio Court of Common Pleas,[46] to be in conflict with the organic law of the State of Ohio, the federal constitution, and even certain articles of the charter of the northwestern territorial government of 1787.

Not Ultra Vires the Corporate Powers to Maintain Relief Association.—The question of the corporate authority of the railroad company to deal with a relief association may be raised with reference to its right to become a member thereof or co-member thereof with its own employees; 2, with reference to its right to become its own insurer against damages growing out of casualties resulting in personal injuries or death to its own employees under a scheme whereby the relief funds are practically raised by assessment off of the employees in the hazardous departments of its service; 3, with reference to its right to carry on the business of furnishing life indemnity or pecuniary benefits to the beneficiaries of deceased members, or accident or permanent disability indemnity to members thereof; but these objections would be unavailable in those cases in which the member or beneficiary had accepted the benefits under well known principles. Nevertheless the contention is still urged that their relief contracts are invalid as being a species of insurance carried on by the railroad company without compliance with general State insurance laws. This contention was resolved in the negative in Iowa,[47] and in Bell v. R. R. Co.,[48] the Supreme Court of Nebraska said: "We cannot presume, in the absence of pleading and evidence that the part taken by this railroad company in the organization and conduct of the relief department, confessedly organized from among its employees and for their benefit, is a power neither granted nor permitted by its charter." And in the second instance in which this contention was made, in the Iowa supreme court,[49] the court said that they were satisfied with the disposition thereof made in the case of Donald v. C., B. & Q. R. Co.[50] Noticing the fact that the Chicago, Burlington & Quincy Voluntary Relief Department had been held not to be an insurance company in Iowa and Nebraska, the Supreme Court of Illinois held[51] that whether the contract where it had not been performed by the payment and receipt of the money, or whether the organization of the relief department, would or would not be held to be *ultra vires*, the corporation, is a question not necessary to the decision of that case, because the employee cannot invoke that defense against the validity of his contract after having secured the benefits therein stipulated for. That the rule that a corporation cannot avail itself of the defense of *ultra vires*, where a contract not immoral in itself nor forbidden by any statute has in good faith been fully performed by the other party, and the corporation has had the full benefit of its performance,[52] applies with equal force to the other party setting out that the contract was *ultra vires*, the corporation. And the court expressly reserved any expression of opinion as to whether or not it would appear in a direct and proper proceeding on the part of the State that the railroad company had exceeded its corporate powers in organizing and maintaining its voluntary relief department.[53] The

[43] § 1307; Donald v. C., B. & Q. R. Co. (Iowa), 33 L. R. A. 495, 61 N. W. Rep. 71.

[44] 87 Ohio Laws, 149, P., C., C. & St. L. R. Co. v. Cox, 35 L. R. A. 510.

[45] Shaver v. Penn. Co., 71 Fed. Rep. 936 See note 70 of this article for a case decided by Gresham, U. S. Circuit Judge.

[46] Cox v. Ry. Co., 33 Ohio L J, April 22, 1895.

[47] Donald v. R. R. Co., 93 Iowa, 284, 33 L. R. A. 496, 61 N. W. Rep. 71.

[48] 62 N. W. Rep. 314.

[49] Maine v. C., B. & Q. R. Co., 70 N. W. Rep. 630.

[50] Donald v. C., B. & Q. R. Co., 93 Iowa, 184, 33 L. R. A. 492, 61 N. W. Rep. 971.

[51] Eckmann v. C., B. & Q R. Co., 169 Ill. Sup. 312, 48 N. E. Rep. 496, 38 L. R. A. 750, 9th Am. & Eng. R. Cas. (N. S.) 308.

[52] McNulta v. Corn Belt Bank, 164 Ill. 427; Kadish v. Garden City Eq. L. & Bldg. Assn., 151 Ill. 531.

[53] This opinion was rendered at the November term, 1897, but at this writing no proceeding on the part of the State to secure a judicial ascertainment of the fact of a usurpation of extra corporate powers on the part of railroad companies maintaining voluntary relief departments has as yet been begun But a bill for injunction to restrain the Chicago, Burlington & Quincy Railroad Company from continuing to operate the Burlington Voluntary Relief Department is now pending in the circuit court of Cook Co, Ill., as I gather from a notice thereof in the Chicago Tribune of recent date, the petitioner, Mrs. Johanna Bynert, also seeking to have the affairs of the organization wound up, and I assume, its assets distributed among the participating holders of membership certificates. Whether our supreme court will consider this such a

leading case sustaining the contracts of a voluntary relief association against the contention that the same were *ultra vires*, the corporate authority, was decided in Pennsylvania, the State wherein this form of organization was first judicially fostered.[54] I shall notice this opinion further on under the subtitle, Pleading and Practice. In Leas v. Penn. Co.,[55] the court says it abundantly appears from the answer of the railroad company that it is a co-member of the relief association with the plaintiff, but as it is shown in the same connection that appellant had obtained and accepted the benefits due on receiving injuries, the objection that membership in an association of that nature was *ultra vires*, the corporation would have probably been unavailing. And on a similar state of facts Judge Allen[56] charged the jury that it was not necessary to determine whether the relief association was an insurance company or not. That he would not feel justified in holding the contract void because the maintenance of the relief department may have some of the elements or features of an insurance company, or because it had not complied with the laws of Illinois in reference to insurance companies. But in each of these cases the plaintiff had accepted the benefits under the contract stipulation that such acceptance should discharge the railroad company from the liability for its tort.

Mutuality — Privity and Consideration.— Where the action is one for personal injuries sustained by the plaintiff while in the defendant's service, the question of mutuality of and privity to the contract, as respects the corporation and its employees, is less difficult of solution than where the question arises in a suit by his personal representatives under the death liability statutes. In either instance the question of consideration moving from the corporation is usually decisive of the question of mutuality and privity. Thus it has been held that the fact of the railroad company having become a contributor to the fund from which the plaintiff accepted the benefits was ample to support the release against these objections.[57] And the obligation to care for the relief fund, administer the affairs of the association, pay its operating expenses, pay interest on sums remaining to its credit, and make good any deficiencies in cash, especially where there was express assent to the terms of the rules and by-laws by both parties were held sufficient to establish the mutuality and due consideration thereof.[58] As said in Chicago, B. & Q. R. Co. v. Miller,[59] the weight of the authorities agree that the obligation assumed by the employer to maintain and support the association by contributing the funds necessary for that purpose creates a privity of contract between the employer and all the members of the association and at the same time furnishes a sufficient consideration to support the contract. And this language is quoted as the most nearly expressing the views of the Supreme Court of Illinois.[60] And while the question has never been directly presented, it seems that the mere guaranty of the railroad company to make good all deficiencies is sufficient consideration for its exaction of the stipulation exonerating it from blame.[61] But supposing the railroad company to have faithfully kept and performed all the covenants entered into on its part with the employee, will that fact thereby impart the element of mutuality or privity with the beneficiaries under death liability statutes? The United States Circuit Court, District of Maryland, has held in the affirmative, the Appellate Court of Illinois, in the negative.[62] In the Illinois case, unlike the case arising under the Maryland death liability act, the widow, although accepting the sum stipulated as the death benefit, seems to have executed no release, but the court intimates that even had she done so it would refuse to adjust the equities in an action wherein she claimed as administratrix to her own, and her children's

direct and proper proceeding as to enable them to pass on the question of *ultra vires*, will be awaited with interest by the profession.

[54] Johnson v. R. Co., 163 Pa. St. 127, 29 Atl. Rep. 854.

[55] (Ind.) 37 N. E. Rep. 423.

[56] Vickers v. C., B. & Q. R. Co., 71 Fed. Rep. 141.

[57] Leas v. Penn. Co. (Ind.), 37 N. E. Rep. 423.

[58] Pittsburg, C., C. & St. L. R. Co. v. Cox (Ohio), 35 L. R. A. 507; Vickers v. C., B. & Q. R. Co., 71 Fed. Rep. 136; Chicago, B. & Q. R. Co. v. Bell, 62 N. W. Rep. 317.

[59] 40 U. S. App. 448. 76 Fed. Rep. 439.

[60] Eckmann v. C., B. & Q. R. Co., 169 Ill. 312, 38 L. R. A. 750.

[61] Ringle v. Penn. Co. (Penn.), 164 Pa. St. 529, 30 Atl. Rep. 492; Spitze v. B. & O. R. Co., 75 Md. 162, 23 Atl. Rep. 307.

[62] State v. B. & O. R. Co., 36 Fed. Rep. 655; Maney, Admx., v. C., B. & Q. R. Co., 49 Ill. App. 115.

use. The opinion in the Maney case is throughout noteworthy for its searching analysis, an invariable mark of the judicial utterances of the learned judge who wrote it, Hon. C. C. Boggs, now on the supreme bench. The case of the Chicago, B. & Q. R. Co. v. Wymore, administratrix, resembles the Black case, in that there was a formal release executed by the widow, while the statute of the State in which the same arose resembles that of the State wherein the cause of action in the Maney case accrued, in that it makes the administrator the statutory plaintiff. The opinion in the Maney case, not having been given the currency of those tending to foster the extension of the voluntary relief system, was, although prior in time by some three years, not cited in the Wymore case.[63] A result was therein reached that agrees neither with that in the Black case nor with that in the Maney case. After holding that if the facts were as claimed Wymore, the decedent, might have maintained an action in his lifetime, the court says: "He had not waived his right of action. He undertook that the beneficiary in the contract might waive it by accepting the benefit, but this action is not for the benefit of his estate, but for that of his widow and next of kin. The measure of damages is not what he might have recovered had he lived, but their pecuniary loss by reason of his death. Whether or not he could by a compromise after the accident but before his death deprive them of their right of action, he could not contract away their right before the injury and without their consent. Nor could he contract that the widow might after his death deprive the next of kin of their remedy. The children, of whom there were eight, were not beneficiaries in the contract, and his contract and the widow's acceptance of a sum for her benefit did not discharge the right of action on the children's behalf. The widow in accepting her benefit acted individually and not as administratrix. In maintaining this action she proceeds in her representative capacity, and is not estopped, as far as the rights of others are concerned, by her acts as an individual. The action can, * * * therefore, be properly maintained, * * * but only so far as necessary to enforce the rights of the children, plaintiff's position being different, she having, after the cause of action accrued, voluntarily accepted a sum of money in discharge and satisfaction of the company's liability," and evidenced the same by a formal release. And even where it appeared that decedent left a widow and but one child, and the child subsequently died, it was held that the administratrix was not barred from maintaining the action on the statute to recover the damages to which the child would have been entitled had he lived, by the fact that, executing as widow, she had collected the death benefit and delivered a release.[64]

Pleading and Practice.—"A cause of action sounding in tort may be settled and discharged by agreement of the wrongdoer and the sufferer. In order that such an agreement may operate as a bar to the suit in tort of the sufferer, three things are necessary: (a) It must be executed by all necessary parties, and by the legal representatives of persons incapacitated, or by the legal representatives whenever required by statute, as in cases of death by wrongful act. (b) It must be founded on a sufficient consideration. (c) It must show a completed intention to discharge the particular cause of action in issue. The agreement discharging the cause of action may take one or more of several not essentially different forms. It may be a compromise, or an accord and satisfaction, or a formal release with or without seal, or a covenant not to sue, or a ratified settlement. * * * But the agreement claimed to operate as a discharge in whatever form it exists is a matter of affirmative defense, and must be specially pleaded."[65] It has been frequently remarked that the acceptance of the

[63] (Neb.) 58 N. W. Rep. 1120.

[64] Montgomery v. Penn. Co. (Ind.), 40 N. E. Rep. 482. And where the railroad company took out a policy of insurance for the benefit of the employee in an accident company, and issued him a certificate evidencing such membership therein, and deducted the accruing assessments from his monthly wages, held that the sole remedy, of his personal representative where he is killed in the service, is by action on the insurance policy against the accident company. Carpenter v. Chicago & E. I. R. R. Co. (Ind. App.), 51 N. E. Rep. 493. But it has been held in Ohio that a release by the widow is no bar to action by the personal representatives, although section 6135, Act of April 13, 1880, gives same for benefit of widow and children. But it is a question for the probate court whether the widow shares in the distribution of damages. B & O. R. Co. v. McCawey, 12 Ohio Cir. Ct. Rep. 543, 1 Ohio Cir. Dec. 631.

[65] 1 Jaggard on Torts, § 106, p. 310.

stipulated benefits bars the action for the tort on principles of estoppel, even binding the statutory plaintiffs to whom have accrued a right of action under death liability acts when they as beneficiaries have drawn money from the relief fund. It is true that this use of the word estoppel finds warrant in the authorities holding that where one compromises a claim or demand by making a choice between two inconsistent or alternative rights or benefits, he is thereafter estopped to assert or claim the other.[66] Nevertheless the writer questions its accuracy. An estoppel is strictly a preclusion in law which prevents a man from alleging or denying a previous fact in consequence of his own previous act, allegation or denial of a contrary tenor.[67] Now, what fact, essential to be averred in order to constitute his cause of action, is the plaintiff precluded from alleging or denying by reason of the perception of benefits? If the scheme of the relief department contemplated benefits in all cases of accidents and injuries except those due to the master's actionable negligence, and it should happen that for an injury due to such negligence the servant, or the parties in whose favor the statute bestowed damages recoverable for his death, should claim and collect the death benefit, I should say that under such circumstances it would be correct to hold that the servant, or his personal representatives were estopped from averring that the accident in which he was killed or injured (as the case might be), was due to the actionable negligence of the master. The use of the term "estoppel," in cases of this nature, however, is merely an effort to establish a more compact terminology. In this instance it operates at the expense of precision. The transaction is in fact an accord and satisfaction.[68] This treatment of the question while bringing it within the exact terms of the definition of accord and satisfaction, *i. e.*, something of legal value to which the creditor before had no right, received in full satisfaction of the debt owing or damages sustained,[69] at the same time satisfies the requirements of common law pleading, namely, the reduction of the controversy to an issue of fact, the juries' finding respecting which shall be decisive of the litigation. "The plea of accord and satisfaction raises an issue upon the delivery or acceptance of something in satisfaction of the debt or damages demanded."[70] The foregoing propositions having been acted upon in every instance with but a single exception, where the relief defense was relied upon, there is, by consequence, practical agreement between the averments of the defendant's special pleas in common law States, and of those paragraphs of the answer setting up affirmative defense in code States. The Illinois, Maryland and West Virginia (federal court), citations make this clear with respect to the common law States. Regard should, however, be had to special statutory provisions that may affect the manner of presenting the relief defense. Thus, in Pennsylvania,[71] the only plea to an action in form of trespass on the case is, since the abolition of the distinction between trespass and case, "not guilty," but the act abolishing this distinction was not intended to tie down that plea to those defenses only that were prior to the enactment of the statute admissible in trespass, and a release is therefore admissible without being specially pleaded in that State. The court also said that "the further objection that the release was not admissible because in form it did not comply with the Act of May 11, 1881 (P. L. 20), requiring copies of the application to be attached to the policy, is sufficiently answered by the consideration that that act applies only to policies issued by insurance companies, and the relief association is not an

[66] State v. B. & O R. Co., 36 Fed. Rep. 655; Chicago, B. & Q. R. Co. v. Bell (Neb.), 62 N. W. Rep. 314; Same v. Curtis (Neb.), 71 N. W. Rep. 42. The application of the principles of estoppel to defeat the action of the beneficiary in the membership certificate suing thereon, after having recovered damages, seems to me to be free from the above criticisms, because the action to recover the stipulated benefits is, of course, contractual. The decedent being competent to designate his beneficiary in the membership certificate is thereby in such privity with her as to invest the relief department with the same right of defense in a case wherein a statutory beneficiary had recovered damages for the death of the employee by reason of the actionable negligence of the master, against an action by the beneficiary in the membership certificate for the death benefit, as against himself should he sue for personal injuries. Fuller v. B. & O. Emp. Rel. Assn., 67 Md. 433, 10 Atl. Rep. 237; Donald v. C., B. & Q. R. Co., 93 Iowa, 284, 33 L. R. A. 492, 61 N. W. Rep. 971.

[67] Winfield, Adjudged Words and Phrases, Estoppel.

[68] Otis v. Penn. Co., 71 Fed. Rep. 136; Eckmann v. C., B. & Q. R. Co., 169 Ill. 312, 38 L. R. A. 750.

[69] Winfield, Adjudged Words and Phrases, Accord and Satisfaction.

[70] Bouvier's L. D. tit. Accord and Satisfaction.

[71] Johnson v. Philadelphia & R. Co., 29 Atl. Rep. 854.

insurance company but a beneficial association." The citations of South Carolina, Ohio, Indiana, Iowa, Nebraska and Colorado decisions, and decisions of the federal courts sitting in those States, will illustrate the pleading and practice with respect to relief defenses in code States.

Conclusion.—There is but one instance in the reports of the judicial consideration of an attempted extension of the scheme of the relief department to other corporations besides railroads. The result was adverse to the claim that the relief contract was valid and binding, and available as a defense. In passing upon the alleged release the court said: "We have no hesitation in saying that an injured person who has contributed to the benefit fund and entitled to share its proceeds who can only obtain such aid by signing the agreement to release and discharge the association company from any and all claim for damages on account of the disabling injury, when such injury was caused by the negligence of the company, its officers and agents, for which such company under the circumstances and rules of law would be liable, is not bound thereby, unless it appears that the injured person was fully informed or had knowledge of the fact of the company's negligence, and of its liability to him therefor, and fully understood that, by signing such agreement, he was thereby releasing and discharging the company from all liability to him from such negligence."[72]

Danville, Ill. WM. B. MORRIS.

[72] O'Neil v. Lake Superior Iron Co. (Mich.), 30 N. W. Rep. 688; *Cf.* Hermann v. Roesner, 8 Fed. Rep. 782.

SHIPPING—JURISDICTION OF STATE COURTS —CARRIERS— PASSENGERS — DAMAGES— BREACH OF CONTRACT.

RANSBERRY v. NORTH AMERICAN TRANSPORTATION & TRADING CO.

Supreme Court of Washington, May 17, 1900.

1. The State courts have jurisdiction of an action against a resident steamboat company for breach of a contract of carriage which was to be performed on the high seas, and without the State.

2. Where a carrier fails to perform its contract of carriage, it is liable in damages for what the passenger necessarily expended in completing the trip from the place where he was abandoned, together with compensation for time lost, beyond the reasonable length of time, which it would have taken defendant to carry plaintiff to his destination, the value of which is to be computed by the reasonable value of plaintiff's service in his usual occupation at the place of destination.

3. In determining the value of plaintiff's services, the jury should take into consideration the question of whether or not plaintiff would have procured employment, had he been at his place of destination during the time he was delayed.

REAVIS, J.: Plaintiff (respondent) was a passenger on the steamship Cleveland, owned by defendant, and operated by it between the city of Seattle and St. Michael, Alaska. In August, 1897, defendant sold plaintiff a ticket entitling him to passage from Seattle to Dawson City, in the dominion of Canada. Defendant at the time of the sale represented that the steamer would make close connections with steamboats owned and operated on the Yukon river by the defendant, and that within a reasonable time thereafter, plaintiff would be safely carried to Dawson City. Defendant agreed to furnish plaintiff's transportation and subsistence, and carry for him baggage to the amount of 150 pounds weight. In pursuance of the contract, plaintiff was carried to Ft. Yukon, about 400 miles below Dawson City, and there abandoned by defendant. Plaintiff thereafter traveled to Dawson City from Ft. Yukon by dog sled, with team of dogs. Plaintiff alleged that he was compelled to make an expenditure of $900 for the necessary means and facilities in traveling between Ft. Yukon and Dawson City, and also alleges that he lost ninety days of time, which was reasonably worth the sum of $12.50 per day. The whole damages for the breach of contract of carriage were laid at 1,975. The jury returned a verdict of $1,500.

Defendant assigns three errors. First, refusal to give the following instruction: "I instruct you that there is no evidence here upon which you can allow plaintiff anything as damages for loss of time, and that you are to allow him nothing in this respect,"—and error in the instruction given by the court, upon which a right of recovery for loss of time was based; second, refusal to grant a new trial on the ground that the verdict was excessive; and, third, overruling the demurrer to the jurisdiction of the court to try the action.

1. The demurrer to the jurisdiction is founded upon the claim that the contract of carriage was a maritime one, and therefore not cognizable in the State court. The case of The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397, is cited upon the demurrer; but in that case a seizure was made of the ship for breach of a contract of carriage under a California statute directing such seizure. It was an action *in rem*, and it was there observed: "A proceeding *in rem*, as used in the admiralty court, is not a remedy afforded by the common law. It is a proceeding under the civil law. When used in the common law courts, it is given by statute." The ninth section of the federal judiciary act of 1789 saves to suitors "the right

of a common law remedy where the common law is competent to give it." The case at bar is a common law action against the person of the defendant, and such actions have been frequently maintained. Crawford v. Roberts, 50 Cal. 235; The E. P. Dorr v. Waldron, 62 Ill. 221.

2. The evidence is sufficient to sustain the verdict if the plaintiff was entitled to recover for loss of time. The rule for damages in this class of cases insisted upon by counsel for appellant is that announced in Hadley v. Baxendale, 9 Exch. 341, as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally (*i. e.*, according to the usual course of things) from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Accepting the rule as stated thus far, "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be such as may fairly and reasonably be considered, * * * arising naturally (*i. e.*, according to the usual course of things) from such breach of contract," there is yet much difficulty left in the application to the varying facts of breaches of contract as they arise. As said by the Supreme Court of Minnesota in Serwe v. Railroad Co., 48 Minn. 78, 50 N. W. Rep. 1021: "The important question, after all, is whether the injury was the direct and proximate, or only the remote, consequence of the wrongful expulsion." That loss of time may be a usual and natural result of the breach of contract of carriage has been recognized by this court in Turner v. Railway Co., 15 Wash. 213, 46 Pac. Rep. 243, where it was determined that a failure to fulfill the contract of carriage of a passenger to a certain destination, subjected the carrier to the expense thereby incurred, including the cost of conveyance by other means, and also that incident to the delay. It was there said of the plaintiff, a lawyer: "Now, it is evident that, if the plaintiff was delayed in reaching his destination by the fault of the defendant, he was damaged, on account of lost time, to an amount exactly equal to that which he would have earned by the practice of his profession." The trial court in that case instructed the jury that plaintiff was entitled to recover such sum as his time at home for the period he was delayed by reason of defendant's failure to transport him was reasonably and fairly worth in his profession or business, and such instruction was approved here; and Yonge v. Steamship Co., 1 Cal. 353, 3 Suth. Dam. (2d Ed.) § 936, and 2 Sedg. Dam. (8th Ed.) § 863, were cited with reference to the evidence tending to establish damage for loss of time. The case of Yonge v. Steamship Co., *supra*, was an action against a common carrier upon a contract to carry the plaintiff from New Orleans to San Francisco. There the trial court instructed the jury "that, it being shown in evidence that the plaintiff was a good bookkeeper, * * * the measure of damages would be the wages at the then rate in San Francisco of a good bookkeeper," during the period of detention on the way. The supreme court say of this instruction: "* * * An improper rule was prescribed by the district judge as the measure of damages. It may be, and probably was, proper to admit evidence that the plaintiff was a good bookkeeper, but it should have been left to the jury to weigh the probabilities of his procuring employment at San Francisco immediately upon his arrival, and of such employment being continued during the entire period covered by the charge of the court." Substantial evidence in the case at bar tended to show that the wages of a common laborer at Dawson City were from $1 to $1.50 by the hour; that such labor was in continuous demand; that the plaintiff had been a laborer nearly all his life, and was able to earn the common wages at Dawson. The evidence also tended to show that plaintiff lost about ninety days of time; that the labor of travel which plaintiff performed was equal to the hardship of labor at any mentioned work in Dawson. The superior court instructed the jury upon the measure of damages that the plaintiff was entitled to recover such sum as would compensate him for any loss in money he had necessarily sustained in completing his journey from Ft. Yukon to Dawson City, together with such other sum as would fairly compensate him for the time he necessarily lost in completing his journey. The court also instructed that the plaintiff was entitled to pay for such time as he necessarily lost, over and beyond the reasonable length of time for defendant to carry plaintiff to his destination at Dawson City; that the rate of compensation for such time was what an ordinary laboring man might or could have procured at Dawson City; and that the jury should determine from the testimony whether the plaintiff could have procured such employment, and, if so, for what length of time, and at what compensation. The jury was further instructed that it should take into consideration in considering the question of wages, the amount which it would have cost the plaintiff to live during the period for which he was allowed for loss of time, and such cost of living should be deducted. It will thus be seen that the rule assumed in Turner v. Railway Co., *supra*, was followed by the superior court in its instructions. The appellant agreed to carry plaintiff to Dawson City in a reasonable time. It abandoned him at the commencement of winter, and left him to complete his journey as best he could. Certainly loss of time was a natural result of the breach of contract. It would also seem that the evidence of damage for such loss was competent, and from it the jury, in its sound discretion, could assess the amount. Much of the

argument in the brief of appellant could be properly addressed to the jury upon the evidence before it, but it is not applicable to the case here. We cannot say that the damages are so excessive as to require a remission, and no error of law occurring, the judgment is affirmed.

Gordon, C. J., and Dunbar and Fullerton, JJ., concur.

NOTE.—*Jurisdiction of State Courts Over Maritime Contracts and Admiralty.*—Under the constitution and statutes of the United States, the district courts have exclusive original jurisdiction of all civil causes of admiralty, and the admiralty jurisdiction of local State courts is now superseded by the jurisdiction of the United States district courts in such cases. Waring v. Clarke, 5 How. 201; The Moses Taylor, 4 Wall. 411; Portland v. Lewis, 2 Serg. & R. (Pa.) 201. There is one exception, however, to this exclusive jurisdiction of the district courts as courts of admiralty. The Judiciary Act of 1789 (Rev. St. U. S., sec. 563), provides: "District courts shall have jurisdiction of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right to a common law remedy where the common law is competent to give it." Under the saving clause of this statute a suitor suing on a maritime contract may proceed *in rem* in the district court of admiralty or he may elect not to go into admiralty at all, and may proceed *in personam* in the proper State or federal court in those cases for which a remedy is provided at common law. Steamboat Hine v. Trevor, 4 Wall. 555; Taylor v. Carryl, 20 How. 583; Leon v. Galceron, 11 Wall. 185. Thus a suit *in personam* by a seaman for wages is maintainable at common law, and therefore may be brought in a State court. Leon v. Galceron, 11 Wall. 185. So also a proceeding *in personam* growing out of a collision. Schoonmaker v. Gilmore, 102 U. S. 118. The decision of the principal case on this point is clearly in line with these decisions and there can therefore be no doubt as to its correctness. The case of The Moses Taylor, 4 Wall. 411, upon which the defendant so strongly relies, decides as follows: That a contract for the transportation of passengers by a steamboat on the ocean is a maritime contract, and there is no distinction in principle between it and a contract for a like transportation of merchandise, that a distinguishing and characteristic feature of a suit in admiralty is that the vessel or thing proceeded against itself is seized and impleaded as the defendant and is judged and sentenced accordingly; that by the common law process property is reached only through a personal defendant, and then only to the extent of his title; that a statute of any State which authorizes actions *in rem* against the vessels for causes of action cognizable in admiralty to that extent attempts to invest her courts with admiralty jurisdiction and are void against the legislation of congress; that the clause of the ninth section, saving to suitors "the right of a common law remedy where the common law is competent to give it," does not save a proceeding *in rem* as used in the admiralty courts, such a proceeding being not a remedy afforded by the common law.

Breach of Contract by Common Carrier for Failing to Carry a Passenger to His Destination.—There is no question in law so difficult of definition and limitation as the negligence of common carriers and the extent of their liability for such negligence. The reports are filled with a multitude of such cases, but in very few of them do the courts seem to recognize any definite principles, each case standing upon its own bottom and decided upon its own peculiar statement of facts. If there is any question of law in regard to which the "case" lawyer may flaunt his alleged superiority in the face of the practitioner of law who prides himself upon his thorough knowledge of its principles, it is this liability of the common carrier for negligence resulting in injury to its passengers and the elements that enter into the measure of damages. While no definite principle can be laid down which will solve all questions arising under every different and peculiar statement of facts, still there are a few well recognized general principles which it is profitable to bear in mind. The contract of a common carrier is different and distinct from contracts made by private citizens or private corporations. The common carrier is a public servant to whom exclusive privileges and advantages have been given and from whom extraordinary care and exceptional service is required. It must serve all persons without discrimination, and the convenience of the public depends upon the safe, continuous and impartial operation of its franchise. Therefore, its negligence, or the negligence of its servants, may not only be a breach of contract, but also a breach of its duty as a public servant, and therefore a tort. It is for this reason that the rule of Hadley v. Baxendale, relied upon so strongly by the defendant in the principal case, and enunciating a well recognized general rule as to the elements and measure of damages, is not to be firmly relied upon in cases of this kind. This rule is as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may be fairly and reasonably construed, either arising naturally from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it." In determining what injuries may be construed as "arising naturally," or may be presumed to have been in the "contemplation of the parties," the jury is allowed a wider latitude in cases of injuries to passengers resulting from the negligence of the common carrier or breach of its contract of carriage than in ordinary breaches of contract. The case of Evans v. The Railroad, 11 Mo. App. 463, furnishes a clear idea of this distinction. This case decided that where a passenger was unlawfully put off a train at a flag station at midnight in a wintry storm, a great distance from his starting point and his destination; and in endeavoring to walk to the next station falls through a cattle guard and is injured, it is proper to submit to the jury the question as to whether the injury was the proximate consequence of the wrong done in putting a passenger off the train. The court said: "The question is whether the lower court erred in permitting the plaintiff to prove that after being put off the train, and while walking along the track toward the next station, he received an injury by falling through a cattle guard. Was this such an injury as might reasonably be expected to flow from the act of putting the plaintiff off the train at the time and place and under the circumstances shown by his testimony? Was this damage a proximate or remote consequence of the wrong of putting him off the train? We must remember that it was a very dark and rainy night and that the plaintiff was totally unacquainted with the country. A traveler put off at such a place and at such a time would be most likely to do what the plaintiff did do, and it is not, we think, straining any

legal principle to hold that the hurt which he received was the proximate consequence of the wrong of putting him off the train under the circumstances. But we regret to find a modern decision of the English Court of Queen's Bench somewhat opposed to us in this view. Hobbs v. Railroad Co., L. R. 10 Q. B. 111. In that case a husband and wife, passengers on a railway train, were taken to the wrong station and there put off, through the negligence of the carrier's servants. They could obtain neither accommodation nor conveyance, and consequently were obliged to walk several miles in the middle of a wet night, in consequence of which the wife caught cold and was sick for some time. It was held that they could recover for the personal inconvenience which they both had suffered, but nothing for the wife's illness. An examination of the opinions of the judges will show that the ground on which they proceeded was that the plaintiffs were only entitled to recover such damages as might reasonably be supposed to have been in the contemplation of the parties at the time of the making of the contract. That unquestionably is the correct rule by which to determine the measure of damages for breaches of contract; but I could never feel satisfied with the application there made of it. In case of the mere breach of such a contract, the refusal to perform it at all, this would no doubt be the correct rule, but it is not so when to the breach of the contract there is added the element of the tort springing out of the breach of a public duty as carrier. In this case the plaintiff's cause of action does not arise *ex contractu* merely. It is an action for a tort as well, founded upon the breach of a public duty by a public carrier. And hence the measure of damages is, not what might reasonably be supposed to have been in the contemplation of the parties at the time when the contract of carriage was made—that is, when the ticket was sold by the carrier—but rather what this conductor might reasonably have expected to flow from his wrongful act of putting this man off at that place at that time of the night and under those circumstances."

The contract of a public carrier to transport a passenger to a certain place designated in its contract with him is broken when the passenger is put off or abandoned at a point other than the point of destination, and for any damages whether in the nature of loss of time, health or comfort proximately resulting thereby, the contracting carrier is liable. This statement of the law hardly needs the citation of any authorities to substantiate it. Where a person goes on the train of a railroad company and pays the fare to a given point, and the conductor before the journey is completed tells the passenger that the train will not go to such station, whereupon the passenger leaves the train and walks to his destination, resulting in sickness to himself, he has a right of action against the company for damages. Florida Southern Railroad v. Katz, 23 Fla. 139. To same effect: Colwell v. Richmond Railroad Co., 89 Ga. 550, in which the court says: "A railroad conductor should not collect and accept from a passenger her fare to a particular station, knowing she intends and desires to get off there, unless he expects to stop the train at that station and allow her to alight. In this case the plaintiff paid her fare and at the same time informed the conductor where she wished to leave the train. It was his duty, if he did not intend to stop there, to tell her so, decline to take her money and allow her to get off. By accepting the fare under these circumstances he became charged with the duty of stopping at her station." Where the officers of a steamboat agreed to stop at a certain landing it is no excuse for a failure to do so that the night was so dark as to render the stoppage dangerous. Porter v. Steamboat, 17 Mo. 290. There is a limitation, however, to the liability of a common carrier in the failure to carry a passenger to his destination. For instance, a railroad company is not liable for taking a child seven years old beyond its station, notwithstanding the promise of the conductor to look after the boy, the company's duty ended when the station was called out. Gage v. Illinois Central R. Co., 21 South. Rep. 657. It is the duty of a person about to take passage on a railroad train, to inform himself when, where and how he can stop under the regulations of the railroad company against which ordinary care in this respect would have protected him, he has no remedy against the company for the consequence. And where a train not scheduled to stop at a certain station, is boarded by a person holding a ticket for such station, without informing himself as to whether he can stop there or not, the mere failure of the conductor to inform him at the first opportunity that the train cannot stop there, is not a breach of the company's obligation so as to render it liable for damages caused to the passenger by being put off at the last preceding station where he is subjected to great inconvenience and exposure. Texas & Pac. Ry. v. Ludlan, 57 Fed. Rep. 481; Beauchamp v. Railway Co., 56 Tex. 239. But where a railway passenger through no fault of his is carried some distance beyond his station on a dark night and there put off the train, and in going back to the station falls through a trestle and is injured, he may recover the damages from the railroad company; and in such case the injury received is not a remote consequence of the wrong done by the railroad company in carrying him beyond the station and putting him off at a point beyond where he was entitled to get off. In estimating the damages in such case the nature and extent of the injury and the plaintiff's mental and physical suffering should be taken into consideration, and an amount should be fixed which will reasonably compensate him for such injury and suffering; also for the expense of medical treatment and the length of time he was incapacitated from his business in consequence of the injury. Winkler v. The Railroad, 21 Mo. App. 99.

St. Louis. A. H. ROBBINS.

JETSAM AND FLOTSAM.

RESPONSIBILITY FOR TRUST SECURITIES.

The New York Supreme Court, in the case of the Colonial Trust Company against Morrison, laid down an important rule with reference to responsibility for trust securities. The facts of the case appear to be that Daniel Morrison, when acting as trustee for an estate, had Francis S. Weeks act as his agent and attorney. (Weeks has since been in State prison for extensive misappropriations of trust funds.) Weeks was permitted to handle the trust funds and to discharge the duties of trustee in Mr. Morrison's stead, during which time he embezzled some of the trust moneys, subsequently succeeding Mr. Morrison as trustee. At least a portion of the securities had been in Weeks' possession as attorney for some time prior to Mr. Morrison's appointment as trustee, and Mr. Morrison continued Weeks as his attorney, leav-

ing the securities under his control. The Colonial Trust Company, which was substituted for Weeks as trustee, brought an action in the supreme court for an accounting by Mr. Morrison. It was claimed by the latter that he had discharged all his duties as trustee, and was not responsible for the acts of Weeks, who, at that time, was a lawyer of high standing and good reputation, and had had the custody of the estate before Mr. Morrison's appointment. Justice Stover, who tried the case, in directing the accounting asked for, said: "A trustee is not relieved from the obligation of looking after the estate committed to his charge by the employment of another person to discharge his duties. The duties of a trustee are personal, involving personal integrity and ability, and a trustee cannot escape this personal responsibility by employing another, however capable, or of whatever high standing and character; and a third person is nothing but the agent of the trustee, for whom the trustee is responsible. It is not enough that he employs a competent agent, but he must see to it that the trust is fully carried out; and upon him personally devolves the duty of discharging the duty of trustee, and this duty cannot be delegated so as to relieve the trustee of legal responsibility. Again, in this case, it is quite apparent that if the trustee had given the attention which the law requires to his duty as trustee, he would have discovered that the funds which Weeks obtained upon the collection of certain securities were not reinvested for the benefit of the trust estate, but were invested in securities which were taken in the name of Weeks individually."—*Albany Law Journal.*

IGNORING FOREIGN DIVORCES.

The law is very well settled in New York that a divorce procured in another State without personal service of process upon the defendant within the territorial limits of such State, especially for a cause not recognized here, is void in New York. People v. Baker, 76 N. Y. 78. In Holmes v. Holmes, 4 Lans. 388, 57 Barb. 305, a judgment of divorce obtained in a foreign tribunal was relied on as an estoppel in a subsequent action by the same plaintiff in this State, he asking the court to ignore it, although the defendant had relied upon it in contracting a new relation. In overruling such defense the General Term used the following language: "That the plaintiff is not estopped from denying the validity of the divorce obtained by him will be seen when it is considered that if it did not, in fact, dissolve the marriage, the courts will not allow either party to deny the existence of the marriage. The parties have no power of themselves, either in form or effect, to dissolve the marriage contract, as would be done if effect should be given to the estoppel claimed in behalf of the defendant. See, also, Todd v. Kerr, 42 Barb. 317."

Although the court went quite far in making this decision it seems logical on principle. If the foreign divorce is so thoroughly void that a spouse who remarries on the faith of it in New York is guilty of bigamy (People v. Baker, *supra*), it is difficult to see how an estoppel either by judgment or even *in pais* can arise. If the defendant husband or wife under the former marriage assumes to remarry, the New York courts do not violate the consistency of their position in ignoring the divorce and the subsequent marriage, and treating any relations contracted in reliance upon the void divorce as meretricious.

In the case of Jencks v. Jencks, recently decided by Judge Freedman at the Special Term of the supreme court, part III, of the first department, New York Law Journal, Feb. 16, 1900, an attempt was made to extend such policy even further, and in our judgment the application of the plaintiff was properly denied. The following is Judge Freedman's memorandum of opinion:

"The plaintiff was married to John A. Haney, Jr. in 1889, at Evansville, Ind. Thereafter she left him and went to Texas, where, in 1897, she obtained a divorce from him. Subsequently she came to this city and married the present defendant. The action is brought by her to have this second marriage annulled on the ground that the divorce obtained by her in Texas was invalid for the reason that she had not acquired a *bona fide* residence in that State for a sufficient length of time, as prescribed by the statutes of said State. Although the present defendant has not defended this action, the judgment prayed for should not be granted on plaintiff's application. Her first husband may have acquiesced in the Texas judgment, which did not forbid him to marry again, and in reliance upon it may have contracted new obligations. He ought to be heard, and in his absence no court of equity should assist the plaintiff on her own application to escape from the consequences of her deliberate acts. Entertaining that view, it is unnecessary to determine whether the proofs submitted by the plaintiff sufficiently establish the invalidity of the divorce. The complaint must be dismissed."

Here it will be seen that the plaintiff was applying for relief, not because of acts committed by the defendant, but affirmatively and purely for the annulment of her own acts. As far as this State is concerned, she seeks to be relieved in her own behalf from the consequences of her own wrong or her own mistake of law. As far as her *status* in Texas is involved, our own courts have no good reason for meddling with it.—*New York Law Journal.*

BOOK REVIEWS.

THE LAW IN ITS RELATIONS TO PHYSICIANS.

This book treats of the right to practice medicine and surgery; contract of physician with patient; contract of patient with physician; rights and liabilities of third parties; right to compensation; recovery of compensation; civil malpractice, including general liability of physician to patient; criminal liability; privileged communication. That portion of the field occupied in common by the legal profession, known as medical jurisprudence, has received the attention of many able writers of both professions, with the result that nearly every question of law requiring elucidation as to its medical aspect has been worked out, and is accessible to the lawyer. But upon the other hand, that portion of the field occupied by the two professions which relates to the needs of the physician in his own practice has been singularly neglected, so that the physician is left without reliable information regarding his legal rights and liabilities; and, what is equally serious, without the opportunity of having recourse to such information except as stress of circumstances may drive him to seek legal advice in some particular case. This book will be found of great assistance to the lawyer in giving the proper legal advice to the physician, being a systematic treatment of those questions of law which present themselves most frequently in his ordinary professional work, and

which he may at any moment be required to advise upon. The chapter upon privileged communications is especially interesting. At common law the protection accorded to professional communications was very limited and applied only to the legal profession, nor does the protection which that profession enjoyed seem to have been as full and adequate as that now accorded to it by the courts and legislatures. The medical and clerical professions were both outside the protection of the common law both in England and in this country, and whatever protection these two professions now enjoy are expressly conferred by statutes. We recommend this book to the favorable notice of the legal profession. The author is Arthur N. Taylor of the New York bar. It is 12mo, bound in buckram, contains 550 pages, printed on excellent paper. Published by D. Appleton & Co., New York.

BOOKS RECEIVED.

A Treatise on Electric Law, Covering the Law Governing all Electric Corporations, Uses and Appliances, also all Relative Public and Private Rights. By Joseph A. Joyce, Author of Joyce on Insurance, and Howard C. Joyce. New York. The Banks Law Publishing Co., 21 Murray Street, 1900. Sheep, pp. 1130, price $6.50. Review will follow.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADJOINING LANDOWNERS — Excavations.—The owner of land adjoining that of another has a right, on giving notice of his intention to do so, to make all proper and needful excavations for purposes of constructions, even up to the line, but he must use ordinary care and take reasonable precaution to sustain the land of the adjoining owner.—BASS v. WEST, Ga., 36 S. E. Rep. 244.

2. ADVERSE POSSESSION — Parol Purchaser.—Possession of land made under a parol purchase for 30 years, being adverse to the vendor, bars his right under either the 15 or 30 years' statute of limitations.—GILBERT v. KELLY, Ky., 57 S. W. Rep. 228.

3. BENEFICIAL ASSOCIATIONS—Proof of Death—Assessments.—Where the by-laws of a beneficial association do not require that an assessment be recorded in the minutes the fact that an assessment was made may be shown by parol.—SUPREME COUNCIL AMERICAN LEGION OF HONOR v. LANDERS, Tex., 57 S. W. Rep. 307.

4. BILLS AND NOTES — Accommodation Note.—Under Sayles' Civ. St. art. 307, providing that when a negotiable instrument has been assigned, for value and before maturity, to a person without notice, he shall be compelled to allow only just discounts against himself, the defense of want of a partner's authority to execute the firm's accommodation note to a second firm, of which he is also a member, cannot be urged against a holder taking the note before maturity as collateral security for the debts of the second firm, though the note was not indorsed to such holder till after maturity.—FT. DEARBORN NAT. BANK v. BERROTT, Tex., 57 S. W. Rep. 340.

5. BILLS AND NOTES — Payment Before Maturity—Interest.—A payee loaning money and taking a note therefor has a right to legal interest thereon, notwithstanding the payor pays the note in full before maturity; there being no agreement between them for a rebate of interest on this account.—CROWLEY v. KOLSKY, Tenn., 57 S. W. Rep. 886.

6. CARRIERS—Ejecting Passenger.—No right of action accrues to a passenger upon a railway train for ejection therefrom when it appears that under a reasonable regulation of the company the ticket which he offered as his right for transportation was limited as to the time in which the carriage was to be performed, and such limit had expired.—SOUTHERN RY. CO. v. HOWARD, Ga., 36 S. E. Rep. 213.

7. CARRIERS—Limiting Liability.—The liability of a common carrier of goods is that of an insurer, and in cases of loss no excuse avails such carrier, unless occasioned by the act of God or the public enemies of the State. He may not limit his legal liability by a notice to the shipper, but he may, with certain restrictions, make an express contract, and both parties entering into it will be bound by its terms.—CENTRAL OF GEORGIA RY. CO. v. LIPPMAN, Ga., 36 S. E. Rep. 202.

8. CARRIERS—Limiting Liability—Negligence.—While the section of the Code which denies to a carrier the right to limit his legal liability by a notice or entry on receipts given or tickets sold, but declares that he may do so by express contract, applies only to carriers of goods, yet, under general law, a carrier of passengers cannot limit his legal liability for the consequences of his own negligence by such notice, or even by express contract.—SOUTHERN RY. CO. v. WATSON, Ga., 36 S. E. Rep 209.

9. CARRIERS—Live Stock—Limiting Liability.—A carrier of live stock may by special contract so limit his liability for loss or damage that he will be liable only in the event he is guilty of "gross negligence."—COOPER v. RALEIGH & G. R. CO., Ga., 36 S. E. Rep. 240.

10. CARRIERS—Live Stock—Negligence.—A live-stock shipper drove cattle for shipment into a receiving pen of a railroad company. The gate leading thereto was sagged so that it could not be fastened without lifting the gate. The employees of the shipper made no effort to raise the gate, and left the cattle without notifying the railroad company of the condition of the gate. The cattle, in rubbing against the latch, pushed the gate open and escaped. A part of them were lost, and the rest were recovered by the shipper at some expense. Held, that the loss was due to the negligence of the shipper, and the railroad company was not liable therefor.—ST. LOUIS, ETC. RY. CO. v. LAW, Ark., 57 S. W. Rep. 258.

11. CARRIERS—Passengers—Burden of Proof.—Where plaintiff sued for injuries sustained in alighting from defendant's train, which did not stop a reasonable time to let off passengers, the burden of proof was on defendant to show contributory negligence, and not on plaintiff to show his want thereof, notwithstanding his petition alleged he exercised ordinary care and diligence in alighting.—PARES v. ST. LOUIS S. W. RY. CO. OF TEXAS, Tex., 57 S. W. Rep. 301.

12. CARRIERS OF PASSENGERS — Street Railway.—A newsboy who jumps on a street car without signaling it to stop, for the purpose of selling papers, and jumping off again, is not a passenger, so as to charge the company with special care to avoid injuring him, though he intended to pay fare if the conductor asked him; it appearing that the conductor did not see him, and that the gripman, who had no authority to grant or refuse him permission to ride, tried to eject him.—

RAMING V. METROPOLITAN ST. RY. CO., Mo., 57 S. W. Rep. 268.

18. CONSTITUTIONAL LAW—Title of Act—Election.—Where an act was entitled "An act to amend the charter of" a named city by incorporating as a part thereof certain described contiguous territory, to define the duties and powers of the municipal authorities in the annexed territory, "and for other purposes," any legislation could constitutionally be embodied in the act which was germane to the general subject of amending the charter of the city.—MAYOR, ETC., OF CITY OF MACON V. HUGHES, Ga., 36 S. E. Rep. 247.

14. CORPORATION — Insolvent Corporations—Claims for Salaries.—Where a receiver was appointed to take control and entire management of all the assets of a corporation, it was not liable to an officer for salary during such receivership, since the performance of the contract between the corporation and the officer was rendered impossible by judicial action, and not by the fault of the corporation.—LENOIR V. LINVILLE IMP. CO., N. Car., 36 S. E. Rep. 185.

15. CORPORATION—Mortgage — Foreclosure.—Code, § 685, provides that any conveyance of a corporation's property shall be void as to torts committed by the corporation, provided the person injured shall enforce his claim within 60 days of the registration of the deed. Held, that it was error to permit a landowner claiming damages for the flooding of his lands by a dam owned by a corporation to intervene in a suit to foreclose the corporation's mortgage, he not having prosecuted his claim within the limit provided by section 685.—WILLIAMS V. WEST ASHEVILLE & S. S. RY. CO., N. Car., 36 S. E. Rep. 189.

16. CORPORATION — Note — President — Authority.—Where the president of a bank had general authority to take, in settlement of a paper due to it, property other than cash, his so doing in a particular instance was binding upon the corporation.—MERCHANTS' NAT. BANK OF ROME V. CAMP, Ga., 36 S. E. Rep. 201.

17. CRIMINAL LAW — Burglary — Accomplice Testimony.—Where, in a prosecution for burglary, prosecutor testified that he took defendant to his place of business, and there stated to him that, if he would bring back the goods, he would let him go, but, if he did not, he would hand him over to the sheriff; that defendant was then told what had been stolen, and said that he would go and bring back all he had, and did return the goods, failure of the court to charge that the prosecutor was an accomplice, and as to the law relative to an accomplice's testimony, was error.—CAMPBELL V. STATE, Tex., 57 S. W. Rep. 288.

18. CRIMINAL LAW—Seduction—Promise to Marry.—Where the mother of defendant, a minor, charged with seduction, refused to allow him to marry prosecutrix, the fact that he offered to marry her was insufficient to relieve him from prosecution, under Pen. Code, art. 969, authorizing the dismissal of prosecution if defendant offered to marry the female in good faith, since defendant's promise without ability to perform was not made in good faith, within the meaning of the statute.—MERRELL V. STATE, Tex., 57 S. W. Rep. 289.

19. DEED—Delivery — Registration.—A proper and legal registry of an instrument raises a presumption of delivery sufficient to establish the fact unless rebutted. An unauthorized registry raises no such presumption, and in that case the validity of the instrument is not established until delivery is affirmatively shown.—STALLINGS V. NEWTON, Ga., 36 S. E. Rep. 227.

20. DEED OF TRUST — Acknowledgment — Setting Aside.—A married woman, whose husband had abandoned her, sued to set aside a deed of trust on her property, purporting to have been executed by herself and husband, and acknowledged in due form by both of them. Held, that such deed of trust should not have been set aside on her unsupported testimony that she did not appear before the officer and acknowledge the deed, and that his certificate was false.—KENNEDY V. SECURITY BLDG. & SAV. ASSN., Tenn., 57 S. W. Rep. 388.

21. EASEMENTS — Creation—Prescription.—Complainant's vendor and defendant's ancestor and predecessor in ownership were owners of adjoining lands, and opened a lane between their premises as a private passway for their personal convenience. Subsequently they closed the lane, and erected a partnership fence but complainant's vendor continued to use the way for 13 years as an outlet from his residence to the public road, and complainant used it for 17 years; such use being permissive merely. Held, that neither the complainant nor his vendor acquired a prescriptive right to its use.—MURRAY V. EALY, Tenn., 57 S. W. Rep. 412.

22. EMINENT DOMAIN—Void Proceedings—Damages — When certain condemnation proceedings instituted by by a bridge company were void, and it had been so adjudged by the circuit court, the fact that an appeal, with *supersedeas*, had been prosecuted to the court of appeals from that judgment, did not preclude the landowner from suing the bridge company to recover damages for the wrongful entry upon the land.—NEWPORT & C. BRIDGE CO. V. GILL, Ky., 57 S. W. Rep. 229.

23. EXECUTION—Claims by Third Parties.—Where defendant, in an action to recover the value of goods taken on execution, pleaded specially that the business in which the goods were used, though carried on in the name of the plaintiff, was in fact the business of the execution debtor, and that it was so conducted for the purpose of defrauding creditors, and evidence was admitted sustaining the plea, it was reversible error to submit only the abstract issue whether the goods belonged to the plaintiff or the execution debtor, and to refuse to submit the real issue raised by the special plea.—P. J. WILLIS & BRO. V. SIMS' HEIRS, Tex., 57 S. W. Rep. 325.

24. EXECUTION—Claim by Third Person.—Under Rev. St. 1895, arts. 5293 5295, requiring the officer, when property levied on is claimed by a third person and a bond given, to indorse on the bond the value of the property assessed by him, and return the bond to the proper court having jurisdiction of the amount, where the officer omits to assess the value of a part of the property the court is not bound to determine its jurisdiction by his assessment, but can hear evidence of value.—CULLERS V. GRAY, Tex., 57 S. W. Rep. 305.

25. FIRES—Negligence.—A railroad company is not liable for injuries resulting from sparks escaping from a locomotive furnished with the best and most approved screen and spark arrester in practical use, provided these appliances were in perfect order.—LOUISVILLE & N. R. CO. V. SAMUELS' EXRS., Ky., 57 S. W. Rep. 235.

26. FRAUDULENT CONVEYANCES—Husband and Wife—Alimony.—Ky. St § 2126, providing that sales and conveyances made to a purchaser without notice, in fraud or hindrance of the right of the wife or child to maintenance, shall be void as against them, does not apply to a conveyance made by a divorced husband to defeat the wife's claim for alimony; but, as she is a creditor, she may, like any other creditor, maintain an action under *Id.* § 1907a, to subject the land fraudulently conveyed, without first obtaining judgment and return of "no property."—CAMPBELL V. TROSPER, Ky., 57 S. W. Rep. 245.

27. HUSBAND AND WIFE.—A married woman is bound by her husband's acts, where she places notes which are her separate estate in his hands to deal with, either as owner or as her agent.—WHITAKER V. LEE, Tenn., 57 S. W. Rep. 348.

28. INSOLVENCY—Attachment Liens — Judgments.—Where foreign creditors of an insolvent domestic corporation procured judgments in the State of their residence, where the corporation had a place of business, the fact that such judgments were irregular, and were used in evidence in a subsequent attachment suit against the corporation in North Carolina, in which such creditors were decreed to have a lien on the attached property, did not affect the attachment lien so as to require such creditors to share equally with other unsecured creditors in a subsequent suit in equity to

subject all the property of the corporation to the claims of its various creditors.—GERMAN LOOKING GLASS PLATE CO. v. ASHEVILLE FURNITURE & LUMBER CO., N. Car., 36 S. E. Rep. 199.

29. INSURANCE—Breach of Warranty.—Where a policy stipulates that assured, on acceptance of it, warrants certain statements to be true, among which is a statement that he will report to the insurer any other insurance taken out by him, the obligation not to take such further insurance without notice cannot be held a warranty, imposing forfeiture for breach.—FIDELITY & CASUALTY CO. OF NEW YORK v. CARTER, Tex., 57 S. W. Rep. 315.

30. INSURANCE—Forfeiture—Waiver—Loss.—Where an insurance company adjusts a small loss under the policy knowing that a condition against incumbrances has been broken, such act constitutes a waiver of the forfeiture, and the company cannot afterwards deny its liability when a second loss occurs.—WESTCHESTER FIRE INS. CO. v. MCADOO, Tenn., 57 S. W. Rep. 409.

31. JUDGMENT—Revival—Notice to Creditors.—A judgment against a former husband cannot be revived, after his death, against decedent's wife, his administratrix, and her second husband, over his objection, merely because he is the husband of decedent's wife. Realty which a former husband, prior to his demise, conveyed to an assignee for benefit of creditors, cannot be subjected to execution at law on a judgment against such former husband which has been revived against decedent's wife and a second husband.—WESSELL v. GROSS, Tenn., 57 S. W. Rep. 371.

32. LIFE ESTATES—Lease by Life Tenant.—Under Shannon's Code, § 4184, authorizing apportionment of rent and recovery therefor until the death of a tenant for life, where such tenant shall die before the expiration of a lease created by him out of his life estate, and before the term fixed for payment of rent, lessees of a deceased life tenant are not entitled to retain possession, as against the remainder man, during the term of their lease, of lands prepared for a crop, but on which no crop is planted, since such statute does not authorize creation of a lease to extend beyond the life estate, and only authorizes recovery for rents due on its termination.—COLLINS v. CROWNOVER, Tenn., 57 S. W. Rep. 357.

33. LIFE INSURANCE—Suicide—Burden of Proof.—Under a policy denying liability in case of the insured's suicide, whether sane or insane, a recovery could be had where the insured's death was caused by taking an overdose of morphine, but the defendant failed to prove by a preponderance of the evidence that insured, in taking the drug, intended to end his life.—BROWN v. SUN LIFE INS. CO., Tenn., 57 S. W. Rep. 415.

34. LIMITATION OF ACTIONS — New Promise.—After a debt which A owed to C, his daughter-in-law, was barred by limitations, he made a payment thereon, and claimed that the remainder was due him for boarding C's children,—his grandchildren. C refused to admit the claim, and threatened to sue, whereupon A answered that she need not bring suit as after his death and that of his wife everything would belong to the children,—that he would will his property to them; and C responded that, if he would will everything to the children, she would accept that proposition in satisfaction of her claim. Held, that there was no such unqualified acknowledgment of the debt as raised a promise to pay, and therefore the debt was not revived.—SCHONBACHLER v. SCHONBACHLER, Ky., 57 S. W. Rep. 232.

35. MARRIED WOMAN—Personal Injury—Action by Married Woman.—Where a woman sues for damages in her own name, alleging herself to be a *feme sole*, and the evidence warrants the submission of her claim to the jury, but also shows that she is a married woman, who has been abandoned by her husband under circumstances which would entitle her to sue in her own name, it is error to direct a verdict for defendant on the theory that she was not authorized to sue alone.—BENNETT v. GILLETT, Tex., 57 S. W. Rep. 302.

36. MASTER AND SERVANT—Injury—Contributory Negligence.—The Alabama statute, now embodied in section 2590 of the Code of that State, rendering a master or employer liable to a servant for an injury "caused by reason of any defect in the construction of the ways, works, machinery or plant connected with or used in the business of the master or employer," does not prevent the defendant in an action brought under this statute from setting up as a defense that there was contributory negligence on the part of the plaintiff.—SOUTHERN RY. CO. v. HARBIN, Ga., 36 S. E. Rep. 218.

37. MUNICIPAL CORPORATIONS—Defective Streets.—Where plaintiff was injured by falling from a bridge forming a part of a public street because of a defective railing against which he was leaning while conversing with another, such fact did not establish that he was not using the street for the purpose for which it was constructed, since by such use he did not *per se* forfeit the protection from injury enjoined on cities to keep their streets in proper repair.—CITY OF WHITEWRIGHT v. TAYLOR, Tex., 57 S. W. Rep. 311.

38. MUNICIPAL CORPORATION — Obstruction to Street.—Under city ordinance requiring a city to establish barriers and danger signals along ditches in its streets, it is proper, in an action against the city for injuries from an insufficiently guarded ditch in its street, to instruct that a failure to comply with the ordinance in this regard was negligence as a matter of law.—CITY OF CORSICANA v. TOBIN, Tex., 57 S. W. Rep. 319.

39. OIL LANDS—Lease—Forfeiture.—Where a lease of oil lands provided that the lessor should have the right to forfeit it if the lessee failed to begin operations thereunder within a certain time, unless the lessee, on written notice of the forfeiture, should elect to pay a certain sum annually during the delay, such written notice was essential to a forfeiture, and the mere delay in beginning operations beyond the time limited was not of itself sufficient to forfeit the lease and let in a subsequent lessee, whose lease was conditioned on the avoidance of the first.—SOUTH PENN OIL CO. v. STONE, Tenn., 57 S. W. Rep. 374.

40. PARTNERSHIP — Infants as Partners.—A business was conducted under the firm name of "J. L. Sidwell & Son," the son being a minor. The merchant's license was in the firm name, and the correspondence, purchase of goods, and drawing of all checks were by the firm. The father, previous to his death, stated that such son was a partner; and the son also had represented himself to be a partner and owner of a half interest in the stock, but after his father's death he denied such partnership. Held sufficient to establish the relation of partnership, giving the son the right, as surviving partner, to wind up the business and pay the partnership debts.—PARKER v. OAKLEY, Tenn., 57 S. W. Rep. 426.

41. PRINCIPAL AND SURETY—Release of Indemnitors.—Where six stockholders of a corporation, for the purpose of raising money for the corporation, agreed that one of their number should sign a note as surety for the corporation, and that each of the others should execute his note to the corporation for one-sixth of the amount, to be indorsed by the corporation to the surety, and pledged to him as indemnity, the obligors in the collateral notes executed pursuant to this agreement did not occupy the relation of guarantors or sureties to the surety in the principal note, as the debt was created for their common benefit, and therefore the renewal of the principal note without their consent did not release them.—KOEHLER v. HUSSEY, Ky., 57 S. W. Rep. 241.

42. RAILROAD COMPANY — Crossings—Negligence.—Where plaintiff's intestate was killed on a crossing by being struck by a backing train after it had stopped and discharged its passengers, plaintiff may show defendant's custom as to where it stopped its trains for the discharge of passengers, and the custom of defendant and the public in using the crossing, as bearing on defendant's negligence in backing its trains, as to the notice to be given, and whether intestate was negli

gent.—BRADLEY v. OHIO RIVER & C. RY. CO., N. Car., 36 S. E. Rep. 181.

43. RAILROAD COMPANY — Negligence.—In an action against a railroad to recover for injuries to a boy, where the plaintiff claims that the boy was sucked under the train by the current of air created by its running at a speed prohibited by ordinance, and the defendant claimed and introduced evidence tending to prove that the boy was standing so near to the cars that he was struck by some projection thereof, testimony of an expert as to whether or not it would have been possible for the boy to have fallen in the manner in which witnesses have testified that he did fall, without the train striking him, is incompetent, since such question was for the jury, and not a proper subject for opinion evidence.—GRANEY v. ST. LOUIS, ETC. RY. CO., Mo., 57 S. W. Rep. 276.

44. RAILROAD COMPANY—Negligence—Fires.—Where a fire was alleged to have been caused by sparks emitted by a particular engine, it was error to admit evidence of other fires caused by sparks from other engines, and of fires caused by passing trains in fields past which another railroad ran, without showing the condition of the engines or the attending circumstances.—HYGIENIC PLATE ICE MFG. CO. v. RALEIGH & AUGUSTA AIR-LINE R. CO., N. Car., 36 S. E. Rep. 279.

45. RELIGIOUS SOCIETY—Action Against.—No action can be maintained against a religious society, when sued as such, when such society has not been incorporated, nor had recorded its name and objects, as provided by law. The members of such society are liable on its contracts as joint promisors or partners.—THURMOND v. CEDAR SPRING BAPTIST CHURCH, Ga., 36 S. E. Rep. 221.

46. REMOVAL OF CAUSES — Foreign Corporations—Constitutional Law.—The refusal to permit a foreign corporation which has become a domestic corporation, in pursuance of Pub. Laws 1899, ch. 62, to remove an action against it for personal injuries to a federal court, does not abridge its privileges and immunities as a citizen of the United States, or deprive it of its property without due process of law, and of the equal protection of the laws, as guarantied by the United States constitution.—DEBNAM v. SOUTHERN BELL TEL. CO., N. Car., 36 S. E. Rep. 269.

47. REPRESENTATIONS—Right of Corporation to Plead Claim of Stockholders.—A corporation cannot recover damages for alleged false representations to the stockholders, whereby they were induced to purchase property which they transferred to the corporation subsequently organized.—LEBANON STEAM LAUNDRY v. DUCKMAN, Ky., 57 S. W. Rep. 227.

48. SALES—Reservation of Title—Bona Fide Purchasers.—Where, by a contract of sale, the buyer is to execute his notes for the purchase price, and the title to the goods is to remain in the seller until the goods are fully paid for, the execution of the notes, or of a renewal note, for the debt, is not a payment, unless by agreement of the parties they are taken as such.—THIPLETT v. MANSUR & TEBBETTS IMPLEMENT CO., Ark., 57 S. W. Rep. 261.

49. SHERIFFS AND CONSTABLES—Indemnity Bonds.—The sureties on an indemnity bond given a sheriff for the seizure of goods under process are not relieved from liability by the loss of the goods by fire, where the sheriff was not negligent in caring for the goods.—VICKERY v. CRAWFORD, Tex., 57 S. W. Rep. 326.

50. TELEGRAPH COMPANY—Messages—Damages—Mental Distress.—Where a telegraph company, on receiving a message for transmission, was informed that plaintiff's purpose in sending it was that the recipient should prepare a grave to receive the body of plaintiff's deceased child, and should meet him with relatives on his arrival with the body, plaintiff was entitled to recover for mental distress and mortification caused by the recipient's failure to meet him with relatives, through the company's negligence in failing to deliver the message.—WESTERN UNION TEL. CO. v. GIFFIN, Tex., 57 S. W. Rep. 327.

51. TRUSTS—Power of Trustee to Sell and Reinvest.—The power conferred by will on a trustee to sell the land devised, with consent of the beneficiaries, and reinvest the proceeds, was not exhausted by one sale and reinvestment.—OWSLEY v. EADS' TRUSTEE, Ky., 57 S. W. Rep. 225.

52. VENDOR AND PURCHASER—Vendor's Lien—Rescission of Sale—Failure to Pay.—In an action by a vendor against his vendee, whom the former has put in possession, to recover possession of land sold, and for which the former retained a vendor's lien, on the ground that the vendee had failed to pay the balance of the price, the vendee cannot recover for improvements made on the land, nor for payments made.—BANKS v. MCQUATTERS, Tex., 57 S. W. Rep. 334.

53. VENDOR'S LIEN—Executory Contract.—A deed of lands, in which is reserved a lien to secure a part of the purchase money, is an executory contract; and the superior title to the land remains in the grantor, and can be defeated only by payment of the purchase money.—EFRON v. BURGOWER, Tex., 57 S. W. Rep. 306.

54. WATERS—Surface Water—Adjoining Lands.—A landowner who has so constructed a dam on his lands as to form a tank in which surface water is collected, until it overflows adjoining land, is liable for the damages resulting to the adjoining land, since the common-law rule that the owner of the lower estate may repel surface water, which is made a part of the laws of Texas by Rev. St. § 3359, providing that the common law shall be the rule of decision until altered or repealed by the legislature, applies only to flowage in natural ways and quantities.—GEMBLER v. ECHTERHOFF, Tex., 57 S. W. Rep. 313.

55. WILLS—Election by Widow.—A widow, to whom a deceased husband has devised all his property for life, cannot be held to have elected to take under such will, by having probated it and taken possession of and assumed control of all the devised property, where the property belonged to the community estate of decedent and his surviving wife, the possession of which she was entitled to as a homestead and exemption, and it was not shown that she received anything of value under the will to which she was not otherwise entitled.—MCCLARY v. DUCKWORTH, Tex., 57 S. W. Rep. 317.

56. WILL—Estate Created—Life Estate with Power.—Where a life estate is given in express terms with power to dispose of the fee by last will, a limitation over in the event the life tenant shall die intestate is valid.—LER v. FIDELITY TRUST & SAFETY VAULT CO., Ky., 57 S. W. Rep. 239.

57. WILLS—Widow—Life Estate.—A testator devised to his widow all his real estate for life, remainder to his children, with the privilege to the widow of selling and conveying it or any part of it, and making title to the same, for her use and support. The children partitioned the remainder among themselves by deed. The widow sued to set aside these conveyances as clouds on her title; claiming that, by reason of the privilege of sale given her, she took in fee, and the remainder over was void. Held, that the widow took a life estate, with authority to sell such portions as might be necessary in case the rents and profits were insufficient for her support, and hence the children's deeds were not clouds on her title.—WATSON v. WATSON, Tenn., 57 S. W. Rep. 385.

58. WILL CONTEST — Appeal—Administration.—Rev. St. 1889, § 13, provides that if the validity of a will be contested, or the executor be a minor, or absent from the State, letters of administration shall be granted during the time of such contest, minority, or absence to some other person. Held, that an order of the probate court revoking letters of administration issued under such section, made after the determination of a will contest in the circuit court, but during the pendency of an appeal therefrom, was erroneous, the appeal to the supreme court being a part of the "time of such contest."—STATE v. GUINOTTE, Mo., 57 S. W. Rep. 281.